(6)

No. 84-1077

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HAROL WHITLEY, *et al.*,

Petitioners,

v.

GERALD ALBERS,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

---

*GENE B MECHANIC
(Appointed by this Court)
STEVEN GOLDBERG
ALICE GOLDSTEIN
808 S.W. Alder, Suite 200
Portland, Oregon 97205
Phone: (503) 224-2372
Counsel for Respondent

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

53

QUESTION PRESENTED

Whether a jury question is created under 42 U.S.C. Section 1983 when substantial evidence shows that the intentional shooting of a prisoner by prison personnel was unnecessary under the circumstances as reasonably perceived by the defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

STATEMENT OF THE CASE

Introduction

This case arises out of the shotgun shooting of Gerald Albers by corrections officers at Oregon State Penitentiary on the evening of June 27, 1980 during the course of a cellblock disturbance. Albers was a prisoner totally innocent of promoting the disturbance. A shotgun blast struck him in the rear left leg, causing considerable permanent disability. Albers has sued various prison officials under 42 USC Section 1983 seeking compensation for his injuries. Defendant Cupp was prison superintendent; defendant Keeney was assistant superintendent; defendant Whitley was security manager and defendant Kennicott was a captain (J.A. 13, 14).[1]

This case was tried to a jury pursuant to plaintiff's exercise of his seventh amendment right to a jury trial. However, the district court removed the case from the jury's consideration by directing a verdict for defendants. *Albers* v. *Whitley*, 546 F.Supp. 726 (D. Or. 1982). The Ninth Circuit reversed the district court's judgment, and remanded for a new trial. The Ninth Circuit held that the trial judge, in issuing a directed verdict against defendant, resolved contradictions in evidence relating to whether the force used was excessive, and passed upon the credibility of witnesses, both of which are properly jury functions. *Albers* v. *Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984).

A directed verdict is appropriate only if, after viewing the evidence as a whole and drawing all possible

---

[1] Citations to the Joint Appendix in this Court are designated as J.A. ____. Citations to the record below are the record certified in the "Excerpt of Record" for the Ninth Circuit and are designated as R. ____.

inferences in favor of the party against whom the verdict is sought, the court finds no substantial evidence that could support a jury verdict in that party's favor. *E.g.*, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 n.6 (1962); *Albers* v. *Whitley*, 743 F.2d at 1375. Therefore, in reviewing the court of appeals' decision below, this Court must view the evidence as a whole and draw all inferences in favor of Albers.

Statement of Facts

Albers was housed in cellblock A, an honor cellblock housing over 200 prisoners with good disciplinary records (J.A. 14). The cellblock consists of two tiers with 56 cells on the upper tier and 55 cells on the lower tier. Lower tier cells are adjacent to an open area from which there is both a stairway leading to the upper tier and a hallway leading out of the cellblock. The lower tier cells are separated from the open area by floor to ceiling bars and a bar door which allows for access from the lower tier cells to the open area (J.A. 14).

On Friday night, June 27, 1980, some prisoners in cellblock A became distressed when they believed that other prisoners being taken to the segregation and isolation ("S and I") building were being mistreated. Two corrections officers, Walker S. Fitts and John Kemper, were on duty in cellblock A at the time. At 9:15 p.m., a bell rang and word was passed down the cellblock that prisoners were to return to their cells ("cell-in") (Tr. 139). At the time, Albers was already at his upper tier cell, number 274 (J.A. 14, 15; Tr. 139).

During the next hour, the following events occured. Immediately after the bell rang, several prisoners questioned Kemper as to the reason for the cell-in order. One prisoner, Richard Klenk, became particularly upset.

Kemper left the cellblock, but Officer Fitts, who was standing nearby, remained. After Kemper left the cellblock, the steel bar door between the lower tier cells and the open area in front of the cellblock was locked (J.A. 15).

Shortly after Kemper left the cellblock, Klenk and a few other prisoners—at most ten to twenty—began to break furniture (Tr. 105, 159). The furniture breaking lasted for about 15 to 30 minutes (Tr. 106, 139, 159). Two prisoners then told Officer Fitts he could go into an office off the open area, saying he would be protected there. After Fitts entered the office, the door to it was closed (Tr. 105, 106, 159; J.A. 15).

Immediately upon learning of the disturbance, Whitley and Captain Jacob went to the prison arsenal and gathered shotguns and tear gas guns (Tr. 210, 369). Both Whitley and Jacob entered cellblock A, stepping over some furniture which had been placed by prisoners in the hallway leading to the cellblock (J.A. 15). Whitley then talked with Klenk, but spoke with no other prisoners (TR. 211). Four prisoners were next allowed to go to the S and I building to see the condition of the prisoners whose apparent mistreatment had triggered the disturbance. Whitley left the cellblock with the four prisoners, who returned to cellblock A after visiting the S and I building (J.A. 15 and 16).

On their way to the S and I Building, the four prisoners observed corrections officers gathering together shotguns and donning vests; after their return to cellblock A, at least one of the four informed other prisoners of the shotguns (Tr. 166-167). Specifically, Klenk was aware that corrections officers had shotguns (Tr. 173). Albers, however, did not know of the shotguns; rather, he believed that any action taken was going to be via tear gas (Tr. 141-142).

Several minutes later, Whitley returned to cellblock A, and at his request, Klenk brought Officer Fitts with him to see Whitley. Whitley again determined that Fitts was unharmed, and again left the cellblock (J.A. 16). Fitts returned to the office, and 15 minutes later he was escorted to cell 201 on the upper tier (J.A. 16). The two prisoners who were housed in cell 201, Kurt Riemer and Michael Kliment, remained in Fitts' vicinity (J.A. 16).

Whitley entered the cellblock for a third time, and, at his request, Klenk took him up to cell 201 where he again saw Officer Fitts and determined he was unharmed (J.A. 16). At that time, the inmates in cell 201 advised Whitley they would prevent harm to Fitts (J.A. 16, 17).

Albers had remained at his cell from 9:15 until 10:15, when another prisoner asked him to go downstairs to help calm down Klenk who was by then the only prisoner acting disruptively (Tr. 110, 141, 185, 187, 425). At approximately 10:15 p.m. Albers went down the stairs from the upper tier to the open area in front of the lower tier cells. At that time, the steel bar door which provides access from the lower tier to the open area was closed and locked. Several elderly prisoners who resided in the forward cells in the lower tier, commonly known as "medical cells," wanted to leave the cellblock in case tear gas was to be used (Tr. 193). Albers asked Whitley for the key to unlock the sliding bar gate in order to let the old men leave the medical cells (Tr. 116, 224). Whitley responded that he could not find the key, and left, saying he would return with it (Tr. 116-118, 193, 224, 580).[2]

---

[2] In its Statement of the Case, the defendants claim that it was at this point that Whitley discovered the "barricade" had been constructed (State's Brief at 4, paragraph 1). In fact, the evidence is clear that Whitley crossed over this "barricade" the first time he entered the cellblock. (*See, e.g.*, J.A. 15; Tr. 213-215, 369).

By this time, the assault group had assembled outside the entry way with Officers Kennicott, Jackson and Smith wielding shotguns (Tr. 375). Cupp, Keeney and Whitley decided to storm the cellblock with firearms (Tr. 374-75, 467, 511). Meanwhile, Albers was waiting at the bottom of the stairway for Whitley to return with the key. Whitley returned, reentered the cell block, and Albers asked about the key. Whitley responded that he did not have it, suddenly screamed "shoot the bastards," and began running up the stairs after Klenk (Tr. 118; see also Tr. 225).

The assault team entered shooting, and Albers immediately headed up the stairway to get back to his second tier cell (Tr. 118). Just prior to or while crossing the "barricade," Kennicott discharged the first shot into the wall opposite the cellblock entrance. (Compare, J.A. 14 with TR. 461).

One purpose of this first shot was to get the prisoners to head back to their cells (Tr. 218-219, 247, 353-4, 460). The only route available to Albers to return to his second tier cell was via the stairway leading up to cell 201 (Tr. 227). But as Albers headed up the stairs towards his cell, Kennicott fired second and third shots at him, one of which hit Albers in the back of his knee (J.A. 17). This occurred no more than 3-5 minutes after Albers arrived downstairs (Tr. 186).

Albers' sciatic nerve was 90% functionally eliminated by the shotgun blast, while the main artery and vein were completely obliterated (Tr. 67). Although Albers placed a tourniquet on his leg while waiting for medical attention (Tr. 119), his blood loss was so extensive that he needed a transfusion of six pints of blood, out of a total of nine to eleven pints in the whole body (Tr. 73, 87).[3]

---

[3] The shotgun injury to Albers' left leg also caused considerable

As Albers was being shot, Whitley and other officers had caught and subdued Klenk at the doorway to cell 201, encountering no resistance on his part (Tr. 164, 234). No prisoners impeded Whitley from catching Klenk (Tr. 233-4, 353, 400, 424) and, in fact, the prisoners housed in cell 201 had prevented Klenk from entering the cell (Tr. 164, 489). With Klenk under control, Officer Fitts left cell 201 and exited from the cellblock, unharmed (J.A. 17, 18).[4]

By the time the assault team entered, the noise level in the cellblock was back to normal and more than a half hour had passed since the furniture breaking had ended (Tr. 106, 112, 159, 188, 193, 227-28, 531). The open area in front of the lower tier cells was normally lit and was bright enough to enable defendants to distinguish Albers from other prisoners and Klenk (Tr. 227, 422, 574, 578-9).

The only prisoner with a weapon was Klenk, who reportedly had a handmade knife in his rear pocket. A thorough shakedown of the cellblock turned up no other weapons (Tr. 499). According to Whitley, only two other prisoners out of the more than 200 residing in the cellblock had

---

permanent damage to the muscle and major arteries (Tr. 66), as well as leaving eight permanent scars of various dimensions (Tr. 81). Three surgeries were performed in an effort to save the leg (Tr. 73-75), and although Albers can now walk with the aid of a brace, he suffers circulatory problems and constant severe pain. Without his brace, he has a "grotesque, debauched" gait. He lacks motion in his toes entirely, cannot move his foot inward or outward and has little control on flexion or extension (Tr. 78-83).

[4] Defendants' statement that the "hostage was still being held at knifepoint" (State's Brief at 17 n.6) is both inflammatory and totally devoid of support in the record. To the contrary, Fitts was being protected by other inmates who kept the only inmate with a knife away from him.

pieces of broken furniture which could be construed as weapons (Tr. 388). Nobody made any gestures with any other pieces of broken furniture (Tr. 109, 531). Sometime after the 9:15 p.m. cell-in order, there was one fight, lasting three to four minutes, (Tr. 107), but there were no other visible confrontations. Nor were any prisoners progressing through the cellblock intimidating or threatening other inmates (Tr. 108).

Rather, Klenk was the sole, out of control actor, with no other prisoners showing support for him (Tr. 214). Klenk was the officers' primary concern (Tr. 231), was viewed by them as the only person who presented a danger (Tr. 355) and, according to Officer Fitts, was the only person who threatened him (Tr. 491). Fitts also said that the other prisoners surrounding him seemed to have his safety in mind and tried to keep Klenk out (Tr. 489). Whitley indicated that he felt Fitts' safety would be secured with Klenk's apprehension (Tr. 386).

From the time the cell-in order was issued at about 9:15 p.m. until he was shot at about 10:30 p.m., Albers received no orders or instructions from any corrections officers related to his movement or location within the cellblock, nor an opportunity to seek safety (J.A. 17). At no time were prisoners (including Klenk) ever requested to return to their cells after the initial cell-in order at about 9:15 pm. (Tr. 187, 226, 425).

Neither Albers nor any other prisoners was ever warned that they might be shot or suffer other consequences if they did not return to their cells. Nor were prisoners advised to fall to the floor, take cover, or stop heading up the stairs once the assault squad entered (Tr. 226, 241, 407). Rather, the assault squad was instructed by Whitley simply to shoot anybody heading up the stairway to the second tier (Tr. 375, 407).

Albers was known by defendants to be a well-behaved prisoner (J.A. 18). After the fact they deemed Albers "a curious onlooker who got in the way and got hurt in the process" (Tr. 320).

Although tear gas had been considered as an option for resolving the disturbance, it was rejected by Whitley and his colleagues, ostensibly because the barricade would have impeded the motion of the guards and the gas. Yet the barricade took "a second or mere fraction of a second to get over" (Tr. 461), or by another estimate, "a couple of seconds" (Tr. 362). It was low enough that Kennicott was able to cross the barricade while carrying, aiming, and firing a loaded shotgun (Tr. 462; J.A. 14), and that a person standing outside the cell block could see Klenk while standing and looking over it (Tr. 215).

The State's expert witnesses, defendant Hoyt Cupp, Roger W. Christ, and W. James Estelle, Jr., all approved the use of firearms, the order to shoot any prisoner heading to cell 201, and the firing of shotguns up the stairway (Tr. 437, 513-14, 552-53).[5] Christ and Estelle both based their testimony upon a set of facts prepared by the State Attorney General's Office entitled "Riot at OSP Cellblock A", a tour of the cellblock, and some photographs (Tr. 426, 542). Cupp and Estelle mistakenly believed that at the

---

[5] Estelle has been Director of the Texas Department of Corrections since 1972 (Tr. 433-434), and has been defendant in at least one case in which officers in institutions under his control have been found to have engaged in excessive force against prisoners. *Ruiz* v. *Estelle*, 503 F.Supp. 1265, 1299 (S.D. Tx. 1980), *aff'd. in part, rev'd. in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1438 (1983). (Tr. 493-497).

At the time of trial, Christ was secretary of the Corrections Department in New Mexico, having been involved in the corrections field since 1957 (Tr. 539-540).

time the assault team entered, the noise level and destruction were escalating, and Klenk was gaining support (compare Tr. 443-44, 516-518 with 106, 112, 159, 188, 193, 227-28, 531). Cupp and Christ further believed incorrectly that there had been repeated cell-in orders that evening which had been disobeyed (compare Tr. 518, 559 with 187, 226, 425). Cupp also was wrong in believing that cellblock lighting was severely diminished (compare Tr. 518 with 227, 422, 574, 578-79).

Although Estelle agreed it would be wise to distinguish between troublemakers and non-troublemakers before using force, and that it would be prudent to give a "stop or I'll shoot" type of warning if circumstances allowed (Tr. 446, 554, 556), he felt verbal warnings were not appropriate here because surprise to Klenk was a necessary element to a successful rush by the assault team (Tr. 438). Mr. Christ agreed (Tr. 548-9). In so concluding, both Christ and Estelle ignored the fact that Klenk already knew the assault team had shotguns (Tr. 173), thereby negating the surprise element on which they relied.

Nonetheless, Estelle agreed with the standards set forth by the American Correctional Association book that the "use of deadly force should be preceded by clear warning that the use of such force is contemplated" and further, if the situation is such that deadly force must be used, it should be employed with utmost precision and selectivity against the particular threat which justifies its use (Tr. 451).

Plaintiff's experts, on the other hand, felt the deadly force used against Albers was unnecessary to prevent harm to Officer Fitts or other inmates (Tr. 266). Among the options short of deadly force against Albers advocated by Lou Brewer were employment of a warning that action

was imminent, or a direct, disabling act to Klenk (Tr. 266, 268).[6] He also felt that non-participants should have been allowed to leave the cellblock (Tr. 268). Even if the only viable option was the use of deadly force, the corrections officers should have issued a verbal warning such as "Stop or I'll shoot" (Tr. 270).

In terms of defendants' overall approach, Brewer said that defendants did not adequately explore less drastic options than storming the cellblock with shotguns (Tr. 262-265, 271). Based on the overview of the situation gleaned from his review of many reports, depositions and other documents, as well as an on-site inspection, he said there was nothing which indicated to him any potential for a larger scale riot erupting in the absence of the action taken (Tr. 265). Plaintiff's second expert, Lee Perkins, indicated that defendants should have used less drastic approaches than firepower. (TR. 311-314).[7]

Legal Proceedings In Lower Courts

At the conclusion of the trial, the district court granted defendants' motion for a directed verdict, concluding that the evidence was insufficient to permit the jury to find a violation of Albers' eighth amendment right to be free

---

[6] Brewer had been in the corrections field since 1961, serving as superintendent of Iowa State Penitentiary from 1969-1978, Stateville Correction Center in Joliet, Illinois from 1978-1979, assistant director for Special Services for Arkansas Department of Corrections from 1979-1980, and at the time of the trial serving as a corrections consultant (Tr. 257-58).

[7] Perkins was employed with the Multnomah County, Oregon Sheriff's Office in 1961, until his retirement in 1977. During that time he headed the internal security division for the Multnomah County Department of Public Safety and was a commander of county jails. (Tr. 298-99).

from cruel and unusual punishment and alternatively, finding that defendants were immune from suit. *Albers* v. *Whitley*, 546 F.Supp. at 733-37.

The Ninth Circuit reversed the district court judgment, and remanded for a new trial, holding that where force used is so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time, an eighth amendment violation is established. *Albers* v. *Whitley*, 743 F.2d at 1374-75. The court of appeals held that the district court usurped the jury's function by resolving contradictions in the evidence and by passing upon the credibility of witnesses. The court also held that defendants were not entitled to a qualified immunity defense. *Id.* at 1376.

SUMMARY OF ARGUMENT

I.

The issue in this case is whether a prisoner has the right to have a jury decide if his or her constitutional protections have been violated, when substantial evidence shows that prison personnel intentionally shot the prisoner, and that the use of this deadly force was unnecessary or excessive under the circumstances. Plaintiff contends that the balancing of values necessitated by this analysis is the precise function which juries have historically served. Indeed, one of the most important roles a jury can perform is to maintain a link between contemporary community values and the penal system.

The essence of the State's position is that this function of the jury somehow evaporates if the prisoner is shot in a "riot" situation. The Constitution simply does not permit the senseless shooting of a prisoner, even during a "riot." There is no "riot" exception to constitutional protection.

This is true whether analyzed in terms of the eighth amendment's cruel and unusual punishments clause or the fourteenth amendment's due process clause. Deliberate and serious intrusion on a prisoner's personal security must be reasonable in light of correctional needs.

The cruel and unusual punishments clause prohibits the "unnecessary and wanton infliction of pain" on a prisoner during confinement. Plaintiff was intentionally shot and that shooting resulted in severe pain and suffering. If the shooting was unnecessary and the reasonable perception of defendants was that it was unnecessary, then the permanent disability from which plaintiff suffers resulted from the unnecessary and wanton infliction of pain. This use of deadly force was a wanton act—it amounted to a reckless or careless disregard of, or indifference to, plaintiff's life and liberty.

Plaintiff submitted sufficient evidence to support a jury determination that his shooting was unnecessary as reasonably perceived by defendants. He was not a participant in any "riot" and, in fact, sought to help the administration resolve the security breach which was primarily promoted by one disruptive prisoner. When defendants stormed the cellblock with shotguns, plaintiff ran up the stairs to his second tier cell. On the way, he was shot in the back of his leg. Plaintiff had received no meaningful warnings of any kind that would have let him know how to avoid being shot. By shooting plaintiff, defendants promoted no security need whatsoever. However, even if the shooting served some small purpose, it remained unconstitutional because it was excessive.

Plaintiff's protection against unreasonable deadly force is also found in the fourteenth amendment's due process clause, which provides a liberty interest against

unjustified intrusions on a prisoner's personal security. Though not every push or shove reaches constitutional dimensions, shooting a person with a shotgun does. The shooting of plaintiff amounted to a bodily intrusion of the most severe kind. Yet, evidence introduced at trial showed that plaintiff's shooting was in no way related to resolving the security breach facing defendants. Even if there was some relationship, there was no need to stop plaintiff's movement by inflicting deadly force upon him, rather than using a less damaging but equally effective option. A jury could properly find that the shooting was unreasonable and done, if not maliciously, at least with reckless disregard for the plaintiff's life and safety.

Regardless of whether defendants' behavior in storming the cellblock with shotguns was professionally acceptable, substantial evidence makes it clear they did not need to shoot plaintiff. Removing this case from jury scrutiny undermines the constitutional fabric of our society. Furthermore, it ignores the heart of the remedy created by 42 U.S.C. Section 1983. The statute was enacted, in part, because of Congress' concern about unjustified violence against citizens by government actors. It provides a remedy for constitutional violations independent of state common law remedies.

Defendants were facing a serious security danger the evening plaintiff was shot. They did need to make delicate predictions and informed decisions without undue delay. Prison officials must be given considerable latitude in achieving security within their institutions. But this deference does not grant officials a license to shoot a prisoner without justification.

II.

Defendants contend that even if their actions did violate plaintiff's constitutional rights, defendants are nonethe-

less immune from liability for damages. However, the issue of qualified immunity is not properly before this Court.

The question presented in the Petition for Certiorari was limited to the merits of whether defendants' actions violated the constitution. The focus of the qualified immunity analysis is entirely different. In determining whether a defendant is entitled to immunity from suit, the Court is only concerned with the state of law at the time of the defendants' actions, and not with the merits of the claim. The question presented by defendants made no mention of, and does not fairly include, any discussion of qualified immunity. Defendants' immunity from suit should not be considered by this Court.

III.

Assuming this Court does reach the question of whether defendants should be immune from liability for their shooting of Albers, the claim of immunity should be rejected. The Court has now developed an objective analysis of the assertion of a qualified immunity defense. If defendants' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known . . .", the immunity defense must fail. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

At the time of plaintiff's shooting by defendants, the law was clearly established that prison officials could not use unreasonable, excessive or unnecessary force against prisoners. The Supreme Court, and a majority of the circuit courts, had held that the eighth and fourteenth amendments prohibited the infliction of unnecessary and wanton pain on a prisoner during confinement.

Defendants contend that their accountability for violating this constitutional duty somehow evaporates since

none of these court decisions presented a situation factually identical to the one faced by defendants—the use of deadly force in quelling a prison riot and rescuing a hostage. Certainly these facts are crucial to the ultimate determination of whether plaintiff's constitutional rights have been violated. However, none of the recent decisions of this Court discussing qualified immunity suggest that such factual identity is necessary in determining whether defendants should be immune from liability when the constitutional duty at issue has been clearly established.

The danger of defendants' argument is that it leads us down a slippery slope: If public officials are immune from suit whenever a clearly established constitutional duty has not been applied to the specific factual context facing those officials, then qualified immunity effectively is transformed into absolute immunity.

Plaintiff's constitutional right to be free from the use of unnecessary or excessive force was clearly established at the time he was shot. Defendants' claim that they should be immune from a lawsuit challenging their violation of this clear right should be rejected.

ARGUMENT

I. **UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, PRISONERS ARE PROTECTED AGAINST THE INTENTIONAL USE OF DEADLY FORCE BY PRISON OFFICERS WHEN THAT FORCE IS GREATER THAN THAT WHICH IS REASONABLY PERCEIVED AS NECESSARY TO MAINTAIN OR RESTORE ORDER.**

This case is about the right of prison officers to use intentional force capable of causing severe injury or death against an unarmed and non-dangerous prisoner. Neither

the eighth amendment's proscription against cruel and unusual punishments nor the fourteenth amendment's due process clause permit the senseless shooting of a prisoner, even during or after a "riot" in which a hostage has been taken.[8]

The Ninth Circuit correctly held that Albers presented sufficient evidence at trial to enable a jury to find that defendants violated his constitutional rights by inflicting force upon him which was "so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by [defendants] at the time." *Albers* v. *Whitley*, 743 F.2d at 1375.

There is no "riot" exception to the constitutional principle that law enforcement officers may not subject a person, including a prisoner, to unreasonable deadly force. The fact that officers are faced with more than a "one-on-one" confrontation must be taken into account in deciding upon the force required to restore order. If a hostage is being held, there may be a more compelling need to use deadly force against threatening participants. Perhaps in some settings, the officer cannot distinguish between innocent bystanders and the wrongdoers in which case the direct use of deadly force against an innocent person may be reasonable from a constitutional perspective.

[8] Plaintiff does not object to the State's characterization of the disturbance on cellblock A as a "riot." However, the invocation of this word does not permit prison officers or the court to suspend consideration of the actual necessity for the use of deadly force under the circumstances. It is for the jury to consider the circumstances surrounding the shooting of Albers in deciding whether defendants' use of force against him was justified.

Here, the evidence showed that during the first half hour after the bell rang, ten to twenty prisoners had been breaking furniture. However, by the time Albers was shot, a half hour later, Klenk was the only inmate whose conduct was violent and threatening.

"[P]rison officials must be permitted to take reasonable steps to forestall [violent confrontation]." *Jones* v. *North Carolina Prisoners Labor Union, Inc.*, 433 U.S. 119, 132-33 (1977). But an emergency does not grant officers a license to kill or permanently maim persons merely because they are within the vicinity of the disturbance. Rather, this Court's repeated approach in resolving claims under the cruel and unusual punishments clause and due process clause compels a ruling that the reasonableness of defendants' use of deadly force against Albers is subject to constitutional scrutiny through a jury.

A. The Cruel And Unusual Punishments Clause Prohibits The Intentional Use Of Deadly Force Against A Prisoner Unless That Force Is Reasonably Perceived As Necessary.

The eighth amendment's cruel and unusual punishments clause is applicable not only to the terms of criminal sentences, *see e.g.*, *Weems* v. *United States*, 217 U.S. 349 (1910); *Gregg* v. *Georgia*, 428 U.S. 153 (1976) (joint opinion), but also to the treatment of prisoners during confinement. *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (applying eighth amendment analysis to a failure to meet a prisoner's serious medical needs); *Rhodes* v. *Chapman*, 452 U.S. 337 (1981) (reviewing prison conditions such as double-celling). *See also Hutto* v. *Finney*, 437 U.S. 678 (1978).

Although the Court has not specifically addressed a case involving a single incident in which physical force was used against a prisoner, it has said that "prison brutality" is a proper subject for eighth amendment scrutiny. *Ingraham* v. *Wright*, 430 U.S. 651, 669 (1977).[9] Indeed,

[9] In drawing this conclusion, the Court referred to Judge Friendly's observation that the cruel and unusual punishments

defendants admit that "where, as here, a lawfully committed prison inmate asserts that his personal security has been unconstitutionally infringed by prison officials the claim properly is analyzed under the Eighth Amendment Cruel and Unusual Punishments Clause." State's Brief at 18-19.

Lower courts have repeatedly held that excessive and unnecessary physical force against a prisoner is constitutionally prohibited. *See, e.g., Bates* v. *Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984); *Albers* v. *Whitley*, 743 F.2d at 1375; *Slakan* v. *Porter*, 737 F.2d 368, 372 (4th Cir. 1984); *Williams* v. *Mussomelli*, 772 F.2d 1130, 1134 (3d Cir. 1983); *Putnam* v. *Gerloff*, 639 F.2d 415, 421 (8th Cir. 1981); *King* v. *Blankenship*, 636 F.2d 70, 73 (4th Cir. 1980); *Martinez* v. *Rosado*, 614 F.2d 829, 832 (2d Cir. 1980); *Furtado* v. *Bishop*, 604 F.2d 80, 95 (1st Cir. 1979); *Clemmons* v. *Greggs*, 509 F.2d 1338, 1340 (5th Cir. 1975); *Suits* v. *Lynch*, 437 F.Supp. 38, 40 (D. Kan. 1977); *see also Spain* v. *Procunier*, 600 F.2d 189, 197 (9th Cir. 1979); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d 12, 22 (2d Cir. 1971); *Beishir* v. *Swenson*, 331 F.Supp. 1227, 1234 (W. D. Mo. 1971).

The decisions of this Court regarding the eighth amendment have highlighted the flexible and dynamic manner in which the words "cruel and unusual" must be

---

clause:

> can fairly be deemed to be applicable to the manner in which an otherwise constitutional sentence . . . is carried out by an executioner, *see Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947), or to cover conditions of confinement which may make intolerable an otherwise constitutional term of imprisonment. *Johnson* v. *Glick*, 481 F.2d 1028, 1032 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

430 U.S. at 669 n.38.

interpreted. *See Gregg* v. *Georgia*, 428 U.S. at 171. The eighth amendment cannot be analyzed through a static test. Rather, it "must draw it meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

Prison conditions which involve the "unnecessary and wanton infliction of pain" are cruel and unusual under contemporary standards of decency in violation of the eighth amendment. *Rhodes* v. *Chapman*, 452 U.S. at 346-47. In *Redman* v. *Baxley*, 475 F.Supp. 1111, 1118 (E. D. Mich. 1979), the court defined "wanton" by referring to established authorities.

> 'Wanton', of course, is a legal term of art. The standard definition of a wanton act is 'one done in reckless or callous disregard of, or indifference to, the rights of one or more persons.' 3 Devitt and Blackmar, *Federal Jury Practice and Instructions*, Section 85.11. 'Ill will is not a necessary element of a wanton act . . .' *Black's Law Dictionary* (Fourth Ed. 1968) at 1753.

The recognition that ill will is not a necessary element of a wanton act comports with one of this Court's earliest interpretations of the eighth amendment. In *Weems* v. *United States*, 217 U.S. at 373, the Court said: "'Cruelty' within the meaning of the eighth amendment can be an instrument of 'zeal for a purpose, either honest or sinister.'" In effect, if Albers' shooting was unnecessary and the reasonable perception of defendants was that it was unnecessary, then the permanent disability from which plaintiff suffers resulted from the "unnecessary and wanton infliction of pain."

The Ninth Circuit in this case agreed that a "formal intent to punish" is not required to establish a violation of

the cruel and unusual punishments clause. *Albers* v. *Whitley*, 743 F.2d at 1374.[10] But the court of appeals also recognized that the constitutional threshold is not crossed unless the conduct of defendants in using unnecessary and excessive force against Albers amounted to more than negligence. Hence, the court stated:

> [I]f the emergency plan was adopted or carried out with 'deliberate indifference' to the right of Albers to be free of cruel unusual punishment, then the eighth amendment has been violated . . . *see Estelle* v. *Gamble*, 429 U.S. 97, 104-106, ... The ['deliberate indifference'] standard may appropriately be applied to test the constitutionality of other exercises of professional judgment by prison officials that result in harm to prisoners. . . . So applied, 'deliberate indifference' goes well beyond negligence and amounts to the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment. *Estelle* v. *Gamble*, 429 U.S. at 104 . . . (citations omitted)

Id. at 1375.

We agree that any jury conclusion that defendants' shooting of Albers was reasonably perceived as unnecessary must include a finding that defendants' conduct amounted to more than negligence. The Ninth Circuit preferred the phrase "deliberate indifference" as the standard of culpability which must be met for a use of force claim to reach constitutional dimensions. Other phrases such as "reckless or careless disregard" would be equally appropriate. But there is no support for the State's position that Albers' eighth amendment claim must fail unless

---

[10] Although a jury need not conclude that defendants intended to punish Albers to find a constitutional violation, Whitley's order to "shoot the bastards" (Tr. 118) provides a jury with sufficient evidence to infer that this intent existed.

he was inflicted with pain "for the sake of inflicting pain." State's Brief at 24-24.[11]

Whether Albers was subjected to the infliction of unnecessary and wanton pain is a jury question. The "assessment of contemporary values concerning the infliction" of deadly force against Albers requires "that we look to objective indicia that reflect the public attitude" toward the shooting. *See Gregg* v. *Georgia*, 428 U.S. at 173. "[O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system" *Id.* at 181. The Chief Justice has emphasized that there is no empirical basis for challenging the general functioning of juries in capital cases or the integrity of jury decisions involving "choosing between life and death in individual cases

---

[11] As noted in the above quote, the Ninth Circuit referred to the adequacy of defendants' "emergency plan" or "riot plan." In fact, this "plan" was not in issue at the trial because the district judge denied plaintiff's motion to compel disclosure of it. (R. 17,21,25,26). While there was evidence at the trial suggesting that the strategy of storming the cellblock with shotguns was itself flawed and unreasonable (see, e.g., J.A. 18, Tr. 260-270, 311-14), a primary focus at trial was on the shooting of Albers rather than on defendants' overall strategy for subduing the disturbance.

As stated in plaintiff's Ninth Circuit Brief at 32,

> Most strikingly, the deadly force that was used, resulting in plaintiff's permanent disability, was not consistent with protecting Fitts. Even though defendants' concern was to stop Klenk, no shots were fired at Klenk. Rather, Klenk was allowed to run up from the first floor of the cellblock to cell 201. Whitley and other officers followed Klenk, and within seconds, Klenk was physically subdued by other inmates and officers. The ostensible plan for and manner of Klenk's apprehension was in no way related to defendants' use of deadly force against plaintiff.

Whatever need defendants perceived to carry shotguns into cellblock A, the crucial question is whether they reasonably perceived a need to shoot Albers as he fled upstairs toward his cell.

according to the dictates of community values." *Furman* v. *Georgia*, 408 U.S. 238, 389 (1982) (Burger, C. J., dissenting). A jury which can effectively apply contemporary community values to a life or death decision can certainly decide whether law enforcement officers have reasonably or unreasonably shot an individual.

Plaintiff submitted evidence which would support a jury conclusion that defendants' conduct was unreasonable. To begin with, he was concededly not a participant in the "riot"; indeed, to the extent that he was active, his only involvement in the evening's events was to attempt to dissuade Klenk from continuing his disruptive behavior and to help elderly inmates avoid the possibility of being exposed to tear gas. To this end, he sought to cooperate with the administration.

At the time of the shooting, the major disruption had ceased and Klenk was the only inmate actively resisting authority. Albers had been on the lower tier for only a few minutes when the assault squad entered with shotguns. He had spoken to Whitley just moments before being shot about the need to permit elderly inmates to leave. When he first saw the shotguns and heard the first shot, he ran up the stairs to reach his cell, as defendants expected he would. He received no commands or warnings at any time that would have let him know what to do to avoid being shot.

Plaintiff contends that the shooting served no valid correctional purpose whatsoever. However, even if it did have some small bearing on defendants' goals, it remained unconstitutional because it was "grossly out of proportion" to any correctional need. *See Gregg* v. *Georgia*, 428 U.S. at 174; *see also Rhodes* v. *Chapman*, 452 U.S. at 347. Any possible benefit to immobilizing this fleeing inmate,

whose conduct had been innocent, could in no way justify the life-threatening act of shooting him at close range with a shotgun.

This Court's application of the cruel and unusual punishments clause has long rested on principles of balancing. The Court has repeatedly balanced the severity of a criminal sanction against the severity of the crime to determine whether its imposition violates the eighth amendment because the punishment is excessive. Capital punishment for rape may serve very legitimate penological goals, including deterrence and retribution. Nonetheless, it is unconstitutional because it is disproportionate. *Coker* v. *Georgia*, 433 U.S. 584, 591-600 (1977) (plurality opinion). A twelve year prison term for the crime of falsifying public records may also have some penological benefit but violates the eighth amendment because it is cruel in its excessiveness and unusual in its character. *Weems* v. *United States* 217 U.S. at 373. Even assuming that a punishment makes a measurable contribution to acceptable correctional goals, it will constitute cruel and unusual punishment if it is "excessive." *Gregg* v. *Georgia*, 428 U.S. at 173. In *Rhodes* v. *Chapman*, 452 U.S. at 347, the Court applied this same reasoning to prison conditions.

The State argues that in assessing a claim of unconstitutional punishment under the eighth amendment, "there is no balancing to be done." State's Brief at 30. It asserts that a violation of the eighth amendment cannot occur unless the infliction of punishment makes no measurable contribution to an accepted correctional goal. State's Brief at 34-35. In other words, the State believes that it may inflict the most severe pain and suffering on a prisoner regardless of its necessity as long as it can show that

the conduct serves even the most insignificant penological purpose.

This no-balancing analysis of the eighth amendment is simply wrong. It ignores the balancing test which this Court has repeatedly emphasized is inherent in eighth amendment analysis, whereby the correctional goal is weighed against the degree of pain it causes. *See Weems* v. *United States*, 217 U.S. at 380-81; *Gregg* v. *Georgia*, 428 U.S. at 174; *Coker* v. *Georgia*, 433 U.S. at 591-600; *Rhodes* v. *Chapman*, 452 U.S. at 346.[12].

Plaintiff does not minimize the difficult and dangerous situation faced by defendants. The fact that there had

[12] The State makes disingenuous references to language used in this Court's opinions involving the eighth amendment to support its argument that no balancing of interests is permissible. State's Brief at 24. In *Estelle* v. *Gamble*, this Court did not state that the infliction of pain is "unnecessary" within the meaning of the eighth amendment only when "no one suggests [that it] would serve any penological purpose." The Court indicated that in "less serious cases" suffering may be "unnecessary" when it serves no penological purpose. 429 U.S. at 103. Similarly, in *Furman* v. *Georgia*, Justice Marshall did not say that a "grossly disproportionate" punishment is unconstitutional only when it "serves no valid legislative purpose." Although he properly considered the legislative purpose served by capital punishment, he did so in the context of examining "whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment." 408 U.S. at 342 (Marshall, J., concurring). Justice Marshall found the "entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'" *Id.* at 332. Further, Justice Brennan did not imply that punishment which is "pointless" is only one without any penological purpose. To the contrary, Justice Brennan promoted a clear balancing test:

> The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.

Id. at 279 (citations omitted) (Brennan, J., concurring).

been a riot, that an officer's safety was in question, and that an inmate was armed and dangerous are all factors which a jury may weigh in the determination of whether the shooting of Albers was unnecessary and wanton. Certainly, plaintiff will have a heavy burden of persuasion. However, the question presented is a classic jury issue.

B. The Fourteenth Amendment's Due Process Clause Prohibits The Unreasonable Intrusion On A Prisoner's Personal Security.

In addition to claiming that the use of deadly force against him violated the cruel and unusual punishments clause, plaintiff claims that the shooting violated his rights under the due process clause.[13]

[13] The district court mistakenly did not "understand plaintiff to assert an independent violation of fourteenth amendment due process" *Albers* v. *Whitley*, 546 F.Supp. at 732 n.1, a belief in which the Ninth Circuit joined, basing its decision on the eighth amendment only. *Albers* v. *Whitley*, 743 F.2d at 1374 n.1. However, from this case's inception, plaintiff has argued that his constitutional protection against the use of excessive and unnecessary force, as well as the use of deadly force without meaningful warning, stems from either or both the eighth amendment's cruel and unusual punishments clause and the fourteenth amendment's due process clause. See Complaint (R. 1); First Amended Complaint (R. 52, paragraph 25; J.A. 7); Plaintiff's Second Proposed Pre-Trial Order (R. 51, paragraph VII(1) and (2)); Transcript of Trial (J.A. 27); "Memorandum in Support of Defendants' Motion for Summary Judgment, Section I(c) (R. 48); and Point I at 27-28 of Plaintiff-Appellant's Ninth Circuit Brief. Thus, we agree with the suggestion of the United States that the "constitutionality of petitioners' actions might more properly be measured by the standard that applies to law enforcement officers' conduct generally: whether petitioners violated respondent's due process rights because they used excessive force. . . ." Brief for the United States as Amicus Curiae at 11. Although its "Question Presented" refers to the eighth amendment only, the State appears to recognize that the question cannot be answered without analyzing plaintiff's rights under the due process clause as well. State's Brief at 26-30. Of course,

At the time he was shot, Albers had a liberty interest in personal security under the due process clause. "Among the historic liberties [protected by the due process clause] was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security." *Ingraham* v. *Wright*, 430 U.S. at 673. This liberty right is "not extinguished by lawful confinement, even for penal purposes." *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) (citation omitted)

> Indeed, '[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.' *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part, dissenting in part). This interest survives criminal conviction and incarceration.

Id. at 316; *see also*, *Robinson* v. *California*, 370 U.S. 660 (1962).[14]

The leading lower court case in the due process adjudication of prisoners' claims of excessive or unwarranted force is *Johnson* v. *Glick*, in which Judge Friendly stated, 481 F.2d at 1032-33:

> [Q]uite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law. . . . Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[15]

Judge Friendly's language has been widely quoted and utilized as both an eighth amendment and due process standard in cases involving prison use of force.[16] This

---

plaintiff can rely on any ground properly raised below to support his position that the decision of the Ninth Circuit should be affirmed, even though the court of appeals based its decision on the eighth amendment only. *See United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

[14] The State implies that a prisoner's liberty interest in personal security under the due process clause itself is extinguished by the fact of lawful criminal conviction, relying on *Meachum* v. *Fano*, 427 U.S. 215 (1976). State's Brief at 19 nn.7, 8. This claim is erroneous. In *Meachum*, the Court was considering a prisoner's general liberty interest to live where he or she wished. A criminal conviction removes that interest in its entirety. *Id.* at 225. The more specific interest in personal security was not discussed in *Meachum* and, this Court has said, remains intact behind the prison gate. *Youngberg* v. *Romeo*, 457, U.S. 315, *See also*, *Hutto* v. *Finney*, 437 U.S. at 682 nn.4-6.

[15] Judge Friendly also considered whether the eighth amendment applied to a spontaneous attack by a guard which "is 'cruel,' and we hope 'unusual' [but] does not fit any ordinary concept of 'punishment'." However, he did not rule on the eighth amendment question because he found the due process clause to be more suitable for the adjudication of rights of the plaintiff, a pre-trial detainee. Subsequent cases in this Court, however, have established that the eighth amendment would apply to a prisoner who suffers unnecessary and wanton pain from a single attack of undue force. *See Estelle* v. *Gamble*, 452 U.S. at 346-47; *Ingraham* v. *Wright* 430 U.S. at 667.

[16] Cases relying primarily on the eighth amendment for analyzing prison use of force cases are cited *supra*, at page 18 of this brief. The cases relying on the due process clause include, *e.g. United States* v. *Stokes*, 506 F.2d 771 (5th Cir. 1975); *Meredith* v. *State of Arizona*, 523 F.2d 481 (9th Cir. 1975); *Arroyo* v. *Schaefer*, 548 F.2d 47 (2d Cir. 1977); *Ridley* v. *Leavitt*, 631 F.2d 358 (4th Cir. 1980); *Shillingford* v. *Holmes*, 634 F.2d 263 (5th Cir. 1981); *Norris* v. *District of Columbia*, 737 F.2d 1148 (D.C. Cir. 1984); *LeBlanc* v. *Foti*, 487 F.Supp. 272 (D. La. 1980).

reliance on *Johnson* is not surprising. Judge Friendly's analysis ultimately rested on the due process prohibition of use of force that "shocks the conscience," *Rochin* v. *California*, 342 U.S. at 172, *quoted in Johnson* v. *Glick*, 481 F.2d at 1033, an analysis which is parallel in its concerns to those of the cruel and unusual punishments clause.

The inquiry suggested by Judge Friendly and adopted throughout the circuits is consistent with the legal standard accepted by the Ninth Circuit here: plaintiff's constitutional rights would "have been violated when the force used is 'so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time,' *Jones* v. *Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2683 . . . (1984)." *Albers* v. *Whitley*, 743 F.2d at 1375. If circumstances such as a "riot" provide prison officials with a reasonable perception of the need to use deadly force against particular prisoners, there is no constitutional violation if those prisoners are shot. On the other hand, the liberty interest in personal security would be hollow indeed if agents of the state could shoot a prisoner, when no reasonable perception warranted such force.[17]

---

[17] In *Jones* v. *Mabry*, the Eighth circuit provides useful guidance on how both the eighth and fourteenth amendments may be considered in determining whether prisoners have been subjected to constitutionally impermissible disabilities. Jones and other state prisoners challenged their placement in a special high security risk classification, resulting in substantial restrictions on their movement in the prison. In particular, the prisoners were required to wear leg irons and shackles when out of their cells.

In analyzing the due process issue, the Eighth Circuit noted that the prisoners' special classification was triggered by a series of events over several months in which inmates had flooded their cells and destroyed the plumbing and fixtures, two inmates had escaped, another group of inmates had to be forcibly returned to their cells, and several inmates made an escape attempt, which included the taking of hostages. "We cannot say that the prison authorities' reaction to this situation was excessive or exaggerated' and that the means employed were not so clearly disproportionate, when measured against these purposes [to prevent escapes and maintain security], as to deserve condemnation as 'punitive'." *Id.* at 595. Having found that the restrictions were not violative of due process, the court used the same balancing test to find that they did not constitute cruel and unusual punishment. *Id.* at 596.

Under this well established due process approach, plaintiff's claim should have been permitted to go to the jury. A jury could have found there was no need to shoot Albers, particularly without giving a verbal warning first as he approached the stairs; that if any action at all was needed he could have been pushed aside or even ordered out of the way; and that the shooting, resulting in severe disability, was done, if not "maliciously and sadistically," *Johnson* v. *Glick*, 481 F.2d at 1033, at least with reckless disregard for plaintiff's life and safety. It is difficult to imagine a more reckless act than shooting a person without giving some meaningful opportunity to avoid probable death or permanent disability.

Where the force used is deadly force, the courts must be especially solicitous of the balance between the individual's paramount interest in life and whatever governmental purposes are served by threatening his life. The Court recognized this principle in *Tennessee* v. *Garner*, 469 U.S. ___, 105 S.Ct 1694 (1985), a fourth amendment case.

The right to personal security is protected by the fourth amendment as well as the due process clause itself. *Ingraham* v. *Wright*, 430 U.S. at 673 n.42. Therefore, the balancing test used by the court when reviewing the

infliction of deadly force in *Garner*, should provide guidance for the resolution of Albers' claims.

In *Garner*, the Court held that a Tennessee statute was unconstitutional insofar as it authorized the use of deadly force against an apparently unarmed and non-dangerous fleeing felony suspect. After considering the specific facts presented, the Court then employed a balancing test to determine whether the shooting was constitutionally reasonable.

> To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion' [citations omitted]. We have described 'the balancing of competing interests' as the 'key principle of the Fourth Amendment' [citations omitted]. Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out.

105 S. Ct. at 1699.

Recognizing that the "intrusiveness of a seizure by means of deadly force is unmatched," *id.* at 1700, the Court weighed the suspect's fundamental interest in his own life and society's interest in judicial determination of guilt and punishment against the governmental interest in effective law enforcement. In doing so, it held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. . . . A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." *Id.* at 1701.

Gerald Albers was more fortunate than Edward Garner. Albers was shot in the back of the knee, not in the

back of the head, as was Garner. But in both cases, "we are dealing with intrusions into the human body," *Schmerber* v. *California*, 384 U.S. 757, 767 (1966), of the most severe kind. Albers bled profusely after being shot, losing six pints of the nine to eleven pints of blood normally present in the human body. He applied his own tourniquet with a piece of his clothing, to stop bleeding to death. This encroachment on his personal security is deserving of a balancing of interests equivalent to the test applied to Garner's shooting.[18]

C. Plaintiff Has A Constitutional Claim Actionable Under Section 1983 Regardless Of The Existence Or Similarity Of State Tort Remedies.

The interests asserted by plaintiff are at the heart of the remedy created by 42 U.S.C. Section 1983. In passing the 1871 Ku Klux Klan Act, from which Section 1983 is derived, Congress was concerned about unjustified violence against citizens by government actors. *Briscoe* v. *Lahue*, 460 U.S. 325, 337 (1983). Claims of unjustified force are subject to constitutional scrutiny through Section 1983 whether they involve a pattern or practice or a single incident. *Monroe* v. *Pape*, 365 U.S. 167, 170-71 (1961); *City of Oklahoma City* v. *Tuttle*, 469 U.S. ___, 105 S.Ct. 2427, 2432-33 (1985); *Tennessee* v. *Garner*.

The existence of a constitutional or statutory remedy under Section 1983 is generally determined without reference to the presence or absence of state common law remedies. *See Monroe* v. *Pape* 365 U.S. at 170-71; *see also Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388,

---

[18] In contrast with defendants' conduct here, the police officer in *Garner* called out "Police, halt" before shooting the fleeing suspect. *Tennessee* v. *Garner*, 105 S.Ct. at 1697.

394-95 (1971) (implied damage remedy for constitutional violations found; inappropriate to resort to "vagaries of state law" for protection of interests of constitutional stature).

Defendants therefore miss the point when they argue that the court below improperly suggested that constitutional liability could be premised on facts that made out a common law tort. Whether or not plaintiff had a tort claim under state law is irrelvant to whether he had Section 1983 claim under the Constitution. The fact that a tort may also be made out by the evidence presented does not detract from the constitutional nature of the injury. After all, as this Court has observed, Section 1983 created "a species of tort liability." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). It "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe* v. *Pape*, 365 U.S. at 187.[19]

---

[19] State tort law is not made any more relevant to this case by *Parratt* v. *Taylor*, 451 U.S. 527 (1981), holding that due process is satisfied when a state remedy is available for a negligent property deprivation. Section 1983 was initially designed to provide a federal remedy where state law was inadequate or, though adequate in theory, was not available in practice. *McNeese* v. *Board of Education for Community Unit School District 187 Cahokia Illinois*, 373 U.S. 669, 672 (1963). The due process claim asserted by plaintiff is substantive, not procedural, in nature. That is, the constitutional evil complained of is the unwarranted shooting, not the failure to provide a hearing before or after the shooting. See *Youngberg* v. *Romeo*, 457 U.S. at 315 (due process provides substantive as well as procedural protections from excessive physical restraints); *Ingraham* v. *Wright*, 430 U.S. at 659 n.12 (procedural due process claim adjudicated, substantive due process claim explicitly reserved); *Parratt* v. *Taylor*, 451 U.S. at 552-53 (Powell, J., concurring) ("The Due Process Clause imposed substantive limitations on state action and under proper circumstances these limitations may extend to intentional and malicious deprivations even where compensation is available under state law.")

Moreover, there is doubt that the doctrine of *Parratt* has application to intentional acts resulting in a deprivation of liberty. That question is not presented in this proceeding. Furthermore, both the district court and court of appeals held that plaintiff has no state law remedy because of the immunity provided to state bodies and employees for "any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of the foregoing." Or. Rev. Stat. Section 30.265(3)(e). *Albers* v. *Whitley*, 546 F.Supp. at 737-739; *Albers* v. *Whitley*, 743 F.2d at 1377.

Examination of the cases cited in sections A and B, *supra*, make it clear that this Court and the lower federal courts have consistently resorted to an independent constitutional analysis in defining prisoner claims of unjust treatment under both the cruel and unusual punishments clause and the due process clauses. In fact, there is significant divergence between common law tort standards and the constitutional standard for unreasonable or excessive force. At common law, a battery is an intentional and unpermitted bodily contact, regardless of whether it is caused by hostile intent and no matter how trivial. *See* Prosser and Keeton on Torts, Section 9 (5th ed. 1984); Restatement (Second) of Torts, Section 13. We agree with Judge Friendly's statement in *Johnson* v. *Glick* that the constitutional standard is more exacting and that "not every push or shove" violates a prisoner's constitutional rights, regardless of its status under state tort law. This reasoning applies equally to claims under the due process and the cruel and unusual punishments clauses.

D. Applying The Appropriate Constitutional Standard To This Case, Sufficient Evidence Was Presented At Trial To Allow A Jury To Conclude That Plaintiff's Constitutional Rights Were Violated By Defendants' Use Of Deadly Force Against Him.

Sufficient evidence was introduced at trial for a jury to conclude that defendants' use of deadly force against Gerald Albers was totally unwarranted. Even if some force was justified under the circumstances, the use of deadly force against plaintiff was "grossly out of proportion to the security needs." *Gregg* v. *Georgia*, 428 U.S. at 174.

The State emphasizes the "[d]elicate predictions and informed decisions" which defendants had to make "swiftly in the attempt to accommodate the conflicting safety interests of the hostage, prison personnel, and the inmates." State's Brief at 10-11. We fail to see how the safety interests of the various persons present at the Oregon State Penitentiary on June 27, 1980 were "conflicting." With respect to the case here, it was simply unnecessary to use force against Albers, particularly deadly force, to protect Officer Fitts.

There is no dispute that the defendants were facing a serious security danger that evening. They did need to make delicate predictions and informed decisions without undue delay. But that does not excuse an unjustified shooting of a harmless prisoner.[20]

---

[20] The Second Circuit realized this when upholding the use of tear gas in a detention facility, a less severe use of force than firearms:

> The prison authorities here were suddenly confronted with an obstreperous inmate to whose aid others might come if released from their cells. The avoidance of a riot that might be difficult to quell is surely a *desideratum* of a reasonable prison administration. To be sure, emergency dos not excuse irresponsibility. *Thus if bullets had been fired in a fashion so indiscriminate as to inflict bodily harm on innocent inmates, the civil rights issue would be different.* (emphasis supplied)

Arroyo v. *Shaefer*, 548 F.2d at 50.

The State draws a false picture of the danger defendants were facing when they shot Albers. Defendants knew or should have known that Albers was unarmed and non-dangerous. He was known to be a well-behaved prisoner (J.A. 18) and he was doing nothing to refute that reputation. Whitley had been inside the cellblock on at least three occasions before Albers even appeared in the open area in front of the lower tier cells. Whitley and Albers talked just minutes before the shooting, with Albers asking Whitley for the key to the steel-barred door so elderly prisoners in the "medical cells" could leave the cellblock. Whitley responded that he could not find the key, and left, saying that he would return with it (Tr. 116-118, 224, 580). Whitley could have told Albers to return to his cell rather than respond in a way which would insure his presence in the open area when the shooting began. Such an order itself would certainly not have shown the hand of defendants so that they would lose any possible element of surprise. In any event, defendants knew that Klenk and other prisoners were aware that firearms might be used since some had already seen the assault squad assemble with shotguns (Tr. 166-67, 173, 414-15).

Defendants also knew that the first shot fired at the wall would result in Albers running up the stairs back to his cell (Tr. 218-219, 247, 400, 458, 460-61). Yet, no officers instructed him to fall to the ground, to stay put, to get away from the stairs, or provided any other orders as to how he could avoid being shot (Tr. 241, 460-461, J.A. 17 paragraph 23).

Again, defendants' viewed Klenk as the real danger. Other prisoners who had broken furniture earlier that evening were just "milling around" (Tr. 188). Neither Albers nor any other prisoner exhibited support for Klenk. To the contrary, the two prisoners who were inside the same cell as Officer Fitts told Whitley that they would prevent any harm to Fitts and met their promise (J.A. 16-17, paragraph 18 and 24).

Plaintiff should be given the opportunity to have a jury decide whether his being shot unreasonably deprived him of his liberty interest in personal security, *Youngberg* v. *Romeo*, 457 U.S. at 315, or amounted to an "unnecessary and wanton infliction of pain." *Rhodes* v. *Chapman*, 452 U.S. at 346. Particularly when the use of deadly force is involved, our Constitution mandates public scrutiny. Such "power [must not] be tempted to cruelty." *See Weems* v. *United States*, 217 U.S. at 373. It has been said that "the Eighth Amendment is our insulation from our baser selves . . . [O]nly in a free society would men recognize their inherent weaknesses and seek to compensate for them by means of a constitution." *Furman* v. *Georgia*, 408 U.S. at 345 (Marshall, J. concurring). Defendants seek to hide behind a shield against which the public cannot scrutinize their conduct.

"The continuing guarantee of . . . [various constitutional rights] to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society." *Hudson* v. *Palmer*, 468 U.S. ___, 104 S.Ct. 3194, 3198-99 (1984). The State's position that they can use the most powerful force available against an individual—deadly force—without any public scrutiny whatsoever, ignores this essential character of our society and must be rejected.

II. THE ISSUE OF DEFENDANTS' QUALIFIED IMMUNITY HAS NOT PROPERLY BEEN RAISED BEFORE THIS COURT.

Supreme Court Rule 21(1)(a) requires that a Petition for Writ of Certiorari shall state the questions presented for review, and that "only the questions set forth in the Petition or fairly included therein will be considered by the Court." In this case, the question presented in the Petition for Certiorari and issues fairly included therein were limited to the merits of whether defendants' actions constituted a constitutional violation. No mention was made of the issue of defendants' qualified immunity. Though this question is set forth as a "question presented" in the *amicus* Brief for the United States, we are aware of no authority allowing an *amicus curiae* to enlarge the issues presented by the Petition for Certiorari.

The issue of qualified immunity has specifically been addressed by this Court in several recent decisions. *Harlow* v. *Fitzgerald*, 457 U.S. 800; *Davis* v. *Scherer*, 468 U.S. ___, 104 S.Ct. 3012 (1984); *Mitchell* v. *Forsyth*, 469 U.S. ___, 105 S.Ct. 2806 (1985). Those cases make clear that in evaluating a qualified immunity defense, the Court's inquiry should not be of the merits of a claim, but rather of the state of the law at the time of defendants' actions. "The entitlement is an *immunity from suit* rather than a mere defense to liability . . ." *Id.* at 2816. The question of qualified immunity, then, is conceptually distinct from the question presented in the Petition for Certiorari in this case, and not "fairly included therein." *Procunier* v. *Navarette*, 434 U.S. 555, 567 (1978) (Burger, C.J., dissenting).

In *Harlow*, *Davis* and *Mitchell*, the questions presented to the court in the Petitions for Certiorari specifi-

cally included the issue of qualified immunity. *Harlow*, 457 U.S. at 806; *Davis*, 104 S.Ct. at 3017; *Mitchell*, 105 S.Ct. at 2809. That was not the case in *Procunier*, where the Court's granting the Petition for Certiorari was limited to the question of whether defendant's negligent interference with a claimed constitutional right stated a cause of action under 42 U.S.C. Section 1983. Nonetheless, in its decision in *Procunier*, the Court did discuss the issue of qualified immunity. However, at the time of that decision, the Court's analysis of the qualified immunity defense included a subjective component which involved the same analysis as the question on which the Court did in fact grant certiorari. The Court therefore treated the qualified immunity question "as a subsidiary issue, fairly comprised by the question which was in fact presented." *Id.* at 559 n.6.

This aspect of the Court's decision in *Procunier* can be distinguished from the instant case insofar as the qualified immunity analysis no longer involves a subjective component. The determination of whether defendants are entitled to claim immunity is completely separate from whether their actions constituted a constitutional violation. This determination is not "fairly included" in the question in defendants' Petition for Writ of Certiorari. The issue of qualified immunity, therefore, is not properly before the Court and should not be considered.

III. THE QUALIFIED IMMUNITY DEFENSE SHOULD NOT BE AVAILABLE TO DEFENDANTS, SINCE AT THE TIME OF THEIR ACTIONS, THE LAW WAS CLEARLY ESTABLISHED THAT PRISON OFFICIALS COULD NOT USE UNREASONABLE, EXCESSIVE OR UNNECESSARY DEADLY FORCE AGAINST PRISONERS.

Prison officials have a qualified immunity from liability in damage actions brought under 42 U.S.C. Section 1983.

Procunier v. *Navarette*, 434 U.S. at 561. Whether defendants should be afforded this insulation from liability is essentially an objective inquiry: If defendants' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known," the immunity defense must fail. *Harlow* v. *Fitzgerald*, 457 U.S. at 818; *see also Davis* v. *Scherer*, 104 S.Ct. 3012; *Mitchell* v. *Forsyth*, 105 S.Ct. 2806.[21] At the same time, where clearly established rights are not implicated, officials must be able to act "with independence and without fear of consequences . . ."—either the consequences stemming from the fear of liability for money damages, or from the general costs of being subjected to the risks of trial. *Id.* at 2815.

At the time of plaintiff's shooting by defendants, the law was clearly established that prison officials could not use unreasonable, excessive or unnecessary force against prisoners. *See* Point I, *supra; see also Slakan* v. *Porter*, 737 F.2d 368 (4th Cir. 1984). This Court had held that

---

[21] In fact, *Harlow*, establishes a progressive, two-level inquiry. First, was the law clearly established at the time? If the answer to this threshold question is no, the official is immune. If the answer is yes, the immunity defense ordinarily should fail unless the official claims "extraordinary circumstances" and can prove that he neither knew nor should have known that his acts invaded settled legal rights. In this case, the State cannot make an "extraordinary circumstances" argument. Indeed, such an argument would be somewhat implausible given the State's administrative rule which explicitly adopts the constitutional standard urged by plaintiff. The Corrections Division's "Rule Governing Process for Use of Physical Force, weapons, Chemical Agents, and/or Restraints" states that ". . . [P]hysical force will be used only with due regard for the safety of staff and the safety of others. Only the minimum degree of physical force which is necessary on any particular occasion will be used." (J.A. 18)

unjustified intrusions on personal security was an historic liberty interest protected by the due process clause, and that the eighth amendment protected prisoners against brutality during confinement. *Ingraham* v. *Wright*, 430 U.S. at 669, 673. The infliction of unnecessary and wanton pain on an individual prisoner had been found to violate the eighth amendment. *Estelle* v. *Gamble*, 429 U.S. at 104.

The leading case of *Johnson* v. *Glick* was decided seven years before Albers' shooting. Judge Friendly's observation that the Constitution prohibits undue force by law enforcement officers had been cited with approval throughout the circuits. *E.g.*, *Hall* v. *Tawney*, 621 F.2d 607, 613 (4th Cir. 1980); *Martinez* v. *Rosado*, 614 F.2d at 832; *Furtado* v. *Bishop*, 604 F.2d at 95; *Meredith* v. *Arizona*, 523 F.2d at 483; *U.S.* v. *Stokes*, 506 F.2d at 776; *Clark* v. *Ziedonis*, 513 F.2d 79, 80 (7th Cir. 1975); *Suits* v. *Lynch*, 437 F.Supp. at 40; *Jackson* v. *Allen*, 376 F.Supp. 1393, 1396 (E.D. Ark. 1974); and *Reed* v. *Philadelphia Housing Authority*, 372 F.Supp. 686, 689 (E. D. Pa. 1974). *Cf.*, *Spain* v. *Procuiner*, 600 F.2d at 196 (use of tear gas on inmates must be limited to avoid 'wanton infliction of pain'); *Clemmons* v. *Greggs* 509 F.2d at 1341 (limits of force used against prisoners to force which is reasonably necessary); and *Inmates of Attica* v. *Rockefeller*, 453 F.2d at 22 (beatings and torture of prisoners 'wholly beyond any force needed to maintain order').[22]

During the aftermath of the Attica uprising, the Second Circuit issued an injunction against physical abuse of

[22] Although the general legal analysis of the Second Circuit, in *Attica*, is applicable to this case, the specific security breach facing defendants when Albers was shot had nothing in common with the Attica uprising or its aftermath.

prisoners which "was wholly beyond any force needed to maintain order." *Id.* at 22. In 1979 the Ninth Circuit emphasized that the "necessity for subjecting a prisoner to a painful device is a measure of its cruelty" under the eighth amendment. *Spain* v. *Procunier*, 600 F.2d at 197. Previously, the Ninth Circuit had relied on this Court's ruling in *Rochin* v. *California* and Judge Friendly's analysis to conclude that the due process clause protected a prisoner against an unprovoked assault and battery by a guard. *Meredith* v. *State of Arizona*, 523 F.2d at 483-84.

Before defendants acted, then, their constitutional duty was clear. There was no need for them to predict "the future course of constitutional law." *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975); *Procunier* v. *Navarette*, 434 U.S. at 562 (1978). At the same time, they had no right to disregard clearly established constitutional principles. This Court has pointedly made clear that the concept of qualified immunity provides "no license to lawless conduct. . . . Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow* v. *Fitzgerald*, 457 U.S. at 819.

In finding that the constitutional standard was not clear at the time of defendants' actions, the district court improperly broadened *Harlow's* requirement that the legal duty be clear, by encompassing a factual component. The inquiry proposed by the district court is not solely the clarity of the constitutional duty regarding the use of deadly force against prisoners. To overcome the immunity defense, according to the district court, plaintiff must also prove that the duty had previously been applied in a factually identical case—one involving the use of deadly force in "quelling a prison riot and rescuing a hostage."

Albers v. *Whitley*, 546 F.Supp. at 737. Defendants and the United States similarly espouse this expansion of *Harlow*. State's Brief at 45; Brief for the United States as Amicus Curiae at 25. However, this Court's development of an objective test for evaluating the assertion of the qualified immunity defense has never required the degree of factual identity suggested by defendants.[23]

Defendants' reliance on several of this Court's recent decisions discussing qualified immunity is misplaced. *Procunier* v. *Navarette* was a damage action against prison officials for interfering with a prisoner's mail, alleging that such interference was a violation of the first and fourteenth amendments. In holding that the officials were immune from suit, the Supreme Court found that at the time in question, the first and fourteenth amendments had not been extended to the protection of state prisoners; correspondence. *Id.* at 565. This contrasts with the situation in plaintiff's case. When Albers was shot in 1980, the eighth and fourteenth amendments had clearly been applied to prohibit the unreasonable use of deadly force against prisoners.

Defendants' reliance on *Davis* v. *Scherer* is also inappropriate. Though the law at the time Davis, a highway patrol officer, was fired required that he be afforded *some* procedural due process protections, which he received, it was not clearly established that he was entitled to a pretermination or prompt post-termination hearing. 104

[23] In fact, in *Little* v. *Walker*, 552 F.2d 193, 197 (7th Cir. 1977), the court emphasized that the defendant:

> cannot hide behind a claim that the particular factual predicate in question has never appeared in *haec verba* in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconstitutionality, a prison official may not take solace in ostrichism.

S.Ct. at 3018-19. Again, this differs from plaintiff's case. At the time Albers was shot, the extent of his constitutional rights was clearly established—he was protected from the use of unreasonable, excessive or unnecessary deadly force.

The most recent Supreme Court decision cited by defendants in support of their argument for immunity is *Mitchell* v. *Forsyth*. In that case, the Court considered a suit for damages stemming from a warrantless wiretap in violation of the fourth amendment. Prior to the Court's decision, but after the defendants' conduct at issue in *Mitchell*, the Court had ruled that the fourth amendment did not permit the use of warrantless wiretaps in cases involving domestic threats to the national security. *United States* v. *United States District Court*, 407 U.S. 297 (1972) (*Keith*). The question in *Mitchell* was whether the defendant was nonetheless entitled to qualified immunity from suit; the Court concluded that he was.

In reaching its decision, the Court held that at the time of Mitchell's actions, the law was not clearly established that warrantless wiretaps in cases involving threats to national security were violative of the fourth amendment. That question had been expressly left unanswered in *Katz* v. *United States*, 389 U.S. 347 (1967), the seminal decision holding that electronic surveilance unaccompanied by any physical trespass constituted a search subject to the fourth amendment's restrictions. Subsequent to *Katz*, Congress failed to answer the question of executive authority to order warrantless national security wiretaps in Title III of the Omnibus Crime Control and Safe Streets Act of 1968; uncertainty was also reflected in the conflicting decisions of the lower federal courts. *Mitchell* v. *Forsyth*, 105 S.Ct. at 2819. Given this legislative and judicial uncertainty, and further given the fact that the

Supreme Court had specifically suggested that the issue of wiretaps in national security cases may have to be treated separately, the Court's decision in *Mitchell* seemed inevitable.

The situation in this case is easily distinguishable from *Mitchell*. Prior to defendants' actions, neither this Court, nor any lower federal court, had ever suggested that unreasonable, excessive or unnecessary deadly force could be used against a prisoner in a "riot" situation. The clearly established law at the time of defendants' conduct was that no such "riot" exception existed. To argue that constitutional protections somehow evaporated merely because a serious security breach existed is absurd, and contrary to the constitutional fabric of this country. *Cf.*, *Tennessee* v. *Garner*, *Keith*.

Defendants' factual identity argument must fail not only because it has no basis in law, but also because of the consequences which would result from its application. To allow the immunity simply because a factual situation had not been previously presented to the courts would decimate the important policy, emphasized by the court in *Harlow*, of holding officials liable for violations of clearly established law.

> In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Butz* v. *Economou*, 438 U.S. at 506 . . .; see *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. at 410 ("For people in Bivens' shoes, it is damages or nothing.").

Harlow, 457 U.S. at 814. To the contrary, such a principle might lead public officials to believe they may have "one bite of the apple" for a constitutional violation in any particular factual setting.

Finally, the United States suggests that particularly in cases involving such broad standards as "due process," "equal protection," or "cruel and unusual punishment," the circuit courts of appeals have required factual identity between the case before the court and relevant precedents. In fact, the decisions cited in support of this proposition hold nothing of the kind. Indeed, in *Hobson* v. *Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984), the court noted that a requirement that there be *no* distinguishing facts between the instant case and existing precedent "would unquestionably turn qualified into absolute immunity by requiring immunity in any new fact situation." In *Hobson* the first and fifth amendment principles relied on by plaintiffs were found by the court to have been well established, and defendants' assertion of immunity was rejected. *Id.* at 29.

Similarly, in *Bates* v. *Jean*, a Seventh Circuit decision involving a prisoner's action against four federal correctional officials for damages allegedly suffered in a beating, the court refused to rule that defendants were immune from suit. According to the court, it was clearly established at the time of defendants' actions in that case that the Constitution prohibited prison officials from intentionally inflicting "excessive or grossly severe punishment." 745 F.2d at 1152 (citations omitted).

In sum, plaintiff's constitutional right to be free from the use of unnecessary or excessive force was clearly established when defendants acted in this case. The claim of qualified immunity should be rejected.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

GENE B. MECHANIC
(Appointed by this Court)
STEVEN GOLDBERG
ALICE GOLDSTEIN
808 S.W. Alder, Suite 200
Portland, Oregon 97205
(503) 224-2372
Counsel for Respondent

October, 1985